

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

In the Matter of	)	
	)	
Section 272(f)(1) Sunset of the BOC Separate	)	WC Docket No. 02-112
Affiliate and Related Requirements	)	
	)	
2000 Biennial Regulatory Review	)	CC Docket No. 00-175
Separate Affiliate Requirements of Section	)	
64.1903 of the Commission's Rules	)	

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**REPLY COMMENTS OF  
SAGE TELECOM, INC.**

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**I. INTRODUCTION AND SUMMARY**

Sage Telecom Inc. ("Sage Telecom"), by its undersigned counsel, hereby respectfully submits these reply comments in response to the Commission's Further Notice of Proposed Rulemaking<sup>1</sup> in the above-captioned proceeding. As set forth more fully below, the record of this proceeding overwhelmingly demonstrates that the Bell Operating Companies ("BOCs") should continue to be subject to the transactional, reporting, and structural requirements of section 272 of the Communications Act of 1934, as amended (the "Communications Act").<sup>2</sup> The Commission should not allow the section 272 requirements to

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<sup>1</sup> *In the Matter of Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements, 2000 Biennial Regulatory Review Separate Affiliate Requirements of Section 64.1903 of the Commission's Rules*, WC Docket No. 02-112, CC Docket No. 00-175, Further Notice of Proposed Rulemaking (rel. May 19, 2003) ("FNPRM").

<sup>2</sup> 47 U.S.C. § 272.

sunset in additional states beyond New York and Texas, where the Commission has allowed the requirements to sunset without the explanation or analysis anticipated by the Communications Act.<sup>3</sup> Rather, the Commission should, in conjunction with the relevant state commission, conduct an analysis that examines whether a BOC continues to exercise market power and whether there is a need for the section 272 safeguards, or alternative safeguards, to remain in effect. Furthermore, the Commission should reconsider its decisions to allow the section 272 requirements to sunset in New York and Texas, and to the extent that the Commission reaffirms those decisions, it should set forth in Commission orders the factual and legal analysis and justification for the decisions.

Indeed, comments in this proceeding from state regulators in Missouri and Texas, in addition to every segment of the telecommunications industry, overwhelmingly demonstrate that the BOCs, in fact, *do* continue to leverage their dominance in the local telephone exchange and exchange access service markets, while simultaneously engaging in anticompetitive and discriminatory practices against their competitors. Accordingly, based on this record, the Commission should continue to subject the BOCs to the safeguards set forth in section 272.

To the extent that the Commission decides not to extend 272 safeguards, there is extensive evidence in this record that the Commission should apply dominant carrier safeguards to the BOCs. (Ad Hoc Telecommunications Users Committee, 17-22) Specifically, Commenters

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<sup>3</sup> See Public Notice, Section 272 Sunsets for SBC in the State of New York By Operation of Law on December 23, 2002 Pursuant to Section 272(f)(1); In the Matter of Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements, WC Docket 02-112, FCC 02-335 (rel. Dec. 23, 2002); Public Notice, Section 272 Sunsets for SBC in the State of Texas By Operation of Law on June 30, 2003 Pursuant to Section 272(f)(1); In the Matter of Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements, WC Docket 02-112, FCC 03-155 (rel. June 30, 2003).

agree with Sage that the Commission should classify the BOCs as dominant in the provision of bundled local and in-region, interstate interexchange telecommunications services. (AT&T 8-19; Sprint, 5-10). Accordingly, the BOCs should be subject to Title II dominant carrier regulations and other pro-competitive requirements with respect to those services, in addition to state commission mandated performance metrics and performance assurance plans. As the Texas Public Utility Commission (“Texas PUC”) noted in its comments in this proceeding, SBC enjoys “continued dominance over local exchange and exchange access services” which “hinders the development of a fully competitive market” in Texas. (Texas PUC Comments, 3).

Moreover, the comments filed herein demonstrate that in the event the Commission ultimately concludes that dominant regulation is not appropriate, the Commission should, at a minimum, impose stringent transparency requirements upon the BOCs as preventive measures designed to detect, expose, and ultimately deter illicit conduct—and to thereby permanently preserve the benefits of competition for consumers. In addition, to ensure compliance with these preventive measures and other statutory obligations, the Commission should adopt effective performance metrics and establish an enforceable penalty mechanism, such as that proposed by Sage in its initial comments. Further, the Commission should provide an effective enforcement venue, outside of the moribund Section 208 complaint process. (AT&T, 53).

**II. THE COMMISSION SHOULD CLOSELY EXAMINE THE COMPETITIVE POSTURE OF THE LOCAL EXCHANGE AND EXCHANGE ACCESS MARKETPLACE BEFORE ALLOWING THE SECTION 272 REQUIREMENTS TO SUNSET.**

Commenters in this proceeding agree with Sage that the Commission should continue to impose the requirements of section 272 until the BOCs have affirmatively demonstrated that competition in the local exchange and exchange access markets has reached a point where the BOCs no longer can leverage their significant near-monopoly power in the local exchange market, and until evidence has been provided that the BOCs' proclivity to engage in discriminatory and anticompetitive conduct has significantly diminished. (Missouri Public Service Commission Comments, 8; New Jersey Ratepayer Advocate, 5 noting that BOCs and independent LECs still the ability and incentive to discriminate against competitors). Indeed, Commissioner Martin expressed concerns about "summarily allow[ing] the section 272 requirements to sunset...through a public notice rather than a Commission order responding to questions raised on the record."<sup>4</sup>

Sage, and the majority of Commenters in this docket, share Commissioner Martin's concerns, and urge the Commission to affirmatively set forth an analysis and justification for granting relief from the requirements of section 272, undertaken in conjunction with the relevant state commission. Sage echoes the Texas PUC, who in a July 10, 2003 letter filed in this docket (and attached hereto as Attachment 1) urged the Commission to either reconsider its decision to allow the section 272 requirements to sunset in Texas, or provide the

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<sup>4</sup> See Concurring Statement of Commissioner Kevin J. Martin, *Public Notice, Section 272 Sunsets for SBC in the State of Texas By Operation of Law on June 30, 2003 Pursuant to Section 272(f)(1); In the Matter of Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, WC Docket 02-112, (rel. June 30, 2003).

public with a Commission order setting forth the factual and legal analysis underlying the Commission's decision to release SBC Texas from the section 272 obligations. Sage shares the Texas PUC's concerns regarding the ability of either the Texas PUC, or competitors, to ensure that competition remains robust in the absence of section 272 obligations.

In forthcoming 272 analyses (for example Massachusetts in December 2003, Kansas/Oklahoma in January 2004) the Commission should set forth a reasoned determination regarding the need, or lack thereof, for section 272 requirements to remain in effect. In making this determination, the Commission should look at whether the relevant local exchange telephone market continues to be irreversibly opened to competition. The Commission also must look at the BOCs' behavior vis-à-vis their competitors, and apply a competitive analysis similar to that utilized by the Commission in section 271 proceedings. As Sage indicated in its initial comments in this proceeding, at this time, Sage believes none of the BOCs can legitimately pass this threshold test.

The record of this proceeding demonstrates that the BOCs are using their dominant competitive position in the local marketplace to engage "in a variety of...anticompetitive activities." (AT&T, 6; Americatel, 29). The record reflects that, as Sage demonstrated in its initial comments, the BOCs have used their local market power to create price squeeze situations for their competitors. (AT&T, 26-33; MCI, 16-19) Accordingly, the BOCs' anticompetitive behavior demands that the Commission continue to impose the structural, transactional, nondiscrimination, and audit/reporting requirements of section 272 until such time as the BOCs no longer have the ability to leverage their market dominance. (AT&T, 7). Sprint, for example, agrees with Sage's argument that because the BOCs remain dominant in the

telephone exchange and exchange access markets and retain the unique ability to adversely impact competition, the Commission should not allow the section 272 safeguards to sunset, but should retain them until such time as adequate performance measurements and enforcement mechanisms are in place. (Sprint at 6-7). As Americatel points out, the public interest would be better served were the FCC to extend the 272 requirements “until such time as the BOCs can no longer control their local service markets.” (Americatel, 29).

The record unequivocally demonstrates that the Commission should, for purposes of its market dominance analysis, define bundled local and interstate interexchange services offerings as a separate relevant service market. (Texas PUC, 3). The BOCs are in the midst of rolling out aggressive marketing campaigns for their bundled service offerings, including combinations of local, intraLATA and interLATA services for a flat monthly rate. Predictably, however, the BOCs ask the Commission to define the market for purposes of its market dominance analysis, in the broadest possible terms, including wireless services, cable telephony, e-mail, instant messaging, and voice over IP telephony. (Verizon, 5-8; SBC, 14-22). The BOCs conclude, based on their sweeping definition of the marketplace, that there is no possible way that ILECs could exercise market power over the long distance market.

However, just last week SBC announced to shareholders that it would focus on “aggressive bundling,” while at the same time reporting that it had recorded the “best RBOC LD net-add quarter ever,” adding 2.3 million interLATA lines, up 63% from year end 2002.<sup>5</sup> As SBC’s 2Q results demonstrate, the BOCs’ aggressive bundling, coupled with pernicious

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<sup>5</sup> See SBC Investor Update: SBC 2003 Q2 Earnings Conference Call Presentation, at 8, 17 (July 24, 2003) (“*SBC Investor Update*”).



anticompetitive acts, have paid dividends, with SBC reporting that following the launch of its retail market initiatives at the beginning of the second quarter 2003, it succeeded in reducing the number of UNE-P lines by 282,000 compared with first quarter 2003.<sup>6</sup> Based upon this record, and given the present mediocre state of competition, with BOCs crowing about their successful win-back programs and substantial growth in long distance services and bundled long distance and local service packages, it would be premature to exempt the BOCs from the section 272 requirements at this time.

**III. THE COMMISSION SHOULD CONSULT WITH THE RELEVANT STATE COMMISSIONS BEFORE GRANTING 272 RELIEF TO ANY MORE BOCS.**

Sage submits that the Commission should consult with the relevant state commission before granting a BOC section 272 relief. Under section 271(d)(2)(B) the Commission is required to “consult with the State commission of any State that is the subject of the application in order to verify the compliance of the Bell operating company with the requirements of subsection (c).”<sup>7</sup>

In requiring the Commission to consult with the states, Congress afforded the states an opportunity to present their views regarding the opening of the BOCs’ local networks to competition. In fulfilling this role, state commissions are required to conduct proceedings that ultimately develop comprehensive factual records concerning BOC compliance with the requirements of section 271 and the status of local competition in the state. As a result of their unique role in the 271 process, state commissions are in the best position to ascertain market conditions at the time the 271 application is filed by the BOC. However, the role of the state

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<sup>6</sup> *SBC Investor Update*, 9.

<sup>7</sup> 47 U.S.C. § 271(d)(2)(B).

commission in monitoring compliance with section 271 obligations continues even well after approval of the application by the Commission. State commissions, in most cases, are directly responsible for implementing, administering and/or overseeing performance assurance plans, monitoring BOC compliance with performance metrics, and adjudicating enforcement proceedings involving the BOCs. Therefore, state commissions are invaluable in making the determinations required to ascertain whether section 272 relief is warranted. Indeed, the Commission has emphasized in previous orders, “the state commissions’ knowledge of local conditions and experience in resolving factual disputes affords them a unique ability to develop a comprehensive, factual record regarding the opening of the BOCs’ local networks to competition.”<sup>8</sup> The state commissions commenting in this proceeding are intimately familiar with competitive conditions in their respective states, and all unanimously agreed that section 272 relief is premature at this time. (Missouri, 8; Texas PUC 3-4).

In the initial comment round in this proceeding the Missouri and Texas state commissions, along with the New Jersey Ratepayer Advocate, urged the Commission to maintain the section 272 separate affiliate safeguards and the biennial audit process in their respective states, citing the significant market impact of the BOCs’ integrated offerings of bundled local and interexchange services. (See *e.g.* Missouri Commission, 6, 8; Texas PUC, 2-4; New Jersey Ratepayer Advocate, 5). The Texas PUC noted that “at this point in time SBC Texas retains both the incentive and ability to discriminate against both local and interexchange competitors and to engage in anti-competitive behavior” and urged the Commission to maintain

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<sup>8</sup> See *Application by SBC Communications, Inc., PacificBell Telephone Company and Southwestern Bell Communications Services to Provide In Region InterLATA Services in California*, 17 FCC Rcd 25650 (Dec. 19, 2002).

the section 272 requirements, which provide the Texas PUC and the Commission with the only “means to ensure SWBT’s compliance with its obligation to provide access to the local exchange and exchange access markets that SWBT controls.” (Texas PUC, 3). Similarly, the Missouri Commission noted that without the information required to be provided pursuant to the section 272 biennial audit process “there is no way to detect and deter discrimination and anti-competitive behavior.” (Missouri Commission, 8). Further, the New York State Department of Public Service (“NYDPS”) noted, prior to the sunset of the 272 requirements as they pertained to Verizon in New York in December 2002, that the NYDPS was “concerned that any modification and/or termination of the separate affiliate and related requirements may be premature in New York since Verizon has no plans to integrate its long distance affiliate into its network operations at this time.”<sup>9</sup>

Given the extensive knowledge of local conditions possessed by state commissions, Sage submits that the Commission should consult with the relevant state commission before granting a BOC any section 272 relief. Sage agrees with the state commissions that filed comments in this proceeding that the Commission should continue to impose the requirements of section 272 until it has been credibly demonstrated that competition in the local exchange and exchange access market has reached a level where the BOCs no longer can leverage their significant near-monopoly power, and that the BOCs’ propensity to engage in discriminatory and anticompetitive conduct has significantly diminished. Without the information required to be collected by the 272 requirements, state commissions and competitors

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<sup>9</sup> See Letter of Lawrence G. Malone, General Counsel NYDPS, to Marlene H. Dortch, WC 02-112 (Aug. 5, 2002).

alike will be powerless to prevent the BOCs from abusing their market power in the provision of local exchange and exchange access services and from discriminating against competitors to gain an advantage for their interLATA affiliates. Without section 272 requirements in place, BOCs will continue to engage in anticompetitive and discriminatory practices designed to leverage their market power in the local exchange and exchange access market in order to quash competition, while at the same time increasing their market penetration in the interexchange market.

#### **IV. CONCLUSION**

The record of this proceeding unequivocally demonstrates that the statutory safeguards of section 272 should be maintained at this time. In considering whether to lift the protections afforded by section 272 of the Act at some point in the future, the Commission should first consult with state commissions so as to be fully informed of the BOCs' competitive record. Competitors and state commissions unanimously agree that the Commission should consider removing the requirements of section 272 only when it has been fully determined, in consultation with the states, that competitive conditions are such that the protections afforded by section 272 are no longer necessary. Moreover, the Commission should reconsider its decisions to allow, without explanation or justification, the sunset of the 272 requirements in New York and Texas.

If and when a BOC's competitive record demonstrates that relief from section 272 is warranted, the Commission should classify the BOC as dominant in the provision of services bundled with local and in-region, interexchange telecommunications services. For the purpose of determining market dominance, the Commission should narrowly treat bundled telecommunications service offerings as the relevant market. Because the BOCs continue to

have market dominance in the provision of wireline telephone exchange and exchange access services, and they continue to use that leverage to the detriment of their competitors, the full panoply of dominant carrier regulations should be applied to them. If the Commission should determine that dominant carrier regulation is not appropriate, it should impose transparency requirements on the BOCs to ensure that potential anticompetitive conduct is deterred or eliminated. Additionally, to ensure further compliance, the Commission should adopt performance metrics, patterned after the Texas and New York standards, and an enforceable penalty mechanism, such as that proposed by Sage in the initial comments filed in this proceeding.

Respectfully submitted,



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Dated: July 28, 2003

# **ATTACHMENT A**

**Rebecca Klein**  
Chairman

**Brett A. Perlman**  
Commissioner

**Julie Parsley**  
Commissioner

**W. Lane Lanford**  
Executive Director



## *Public Utility Commission of Texas*

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July 10, 2003

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Federal Communications Commission  
445 12th Street, SW, Suite TW-A325  
Washington, DC 20554

RE: *In re Review of Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements WC Docket No. 02-112*

Dear Ms. Dortch:

The Public Utility Commission of Texas ("Texas PUC") submits this letter to respectfully request that the Federal Communications Commission reconsider its decision to sunset SBC's section 272 obligations, other than section 272(e). Alternatively, the Texas PUC requests that the FCC reconsider its decision to allow these obligations to sunset through use of a public notice, rather than by Commission order.

The reasons the Texas PUC requests reconsideration of the section 272 sunset have been set out in our previous filings in this docket. So as to not belabor these points, we will not discuss the substance of those comments again, but we do point out that clarifications to the comments filed on May 22, 2003, are attached to this letter as Appendix A.

Even if the FCC determines that it will not reconsider the substance of its actions, the Texas PUC strongly urges the FCC to set out in a Commission order the FCC's analysis behind this action. This request is not undertaken lightly, nor is it made without serious need for such an order. As the regulatory agency charged with ensuring that local telephone competition remains as vibrant as possible, the Texas PUC must have a firm understanding of what actions and conduct the FCC believes is in furtherance of, and in compliance with, the Federal Telecommunications Act of 1996.

Without knowing what actions SBC took to achieve release from the majority of its section 272 obligations, or what representations the FCC relied on in allowing sunset, the Texas PUC cannot possibly hope to hold SBC to those standards. This is particularly true in light of the concerns the Texas PUC shared with the FCC in the comments it filed in this docket. Not only is this guidance necessary so that Texas can ensure that the necessary standards are maintained, but it would also benefit other state commissions that will be undergoing section 272 sunset proceedings in the future.

Ms. Marlene H. Dortch  
July 10, 2003  
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In sum, the Texas PUC must know what conduct the FCC believes constitutes substantial compliance with federal law so that, in turn, we can uphold our duties. Without this understanding, the Texas PUC has the understandable concern that our two commissions may inadvertently be working in dissonance, rather than in harmony.

The Texas PUC appreciates the opportunity to make this request, and to provide the clarifications contained in Appendix A.

Respectfully submitted,

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/original signed/  
Rebecca Klein, Chairman

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Brett A. Perlman, Commissioner

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Julie Parsley, Commissioner